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In the

Supreme Court of the United States

OCTOBER TERM 1947

No.....

SAMUEL HANNAH FOGEL,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI

To the Honorables, the Chief Justice and Associate Justices of the United States:

Samuel Hannah Fogel, petitioner herein, presents herewith his petition for writ of certiorari and respectfully shows:—

1.

SUMMARY AND SHORT STATEMENT OF THE MATTER INVOLVED

This is a criminal case in which the petitioner was convicted of a felony under an indictment found by the Grand Jury and filed on January 22, 1947 alleging his failure to register on February 16, 1942 in violation of the Selective Training & Service Act of 1940 as amended and rules, orders, and regulations issued thereunder. Petitioner was

sentenced by the Court which tried the case without the aid of a jury to eighteen months in the penitentiary and to pay a fine of One Thousand ($1,000.00) Dollars.

By proper motion to dismiss the indictment and for acquittal at the close of the government's case and at the close of all the testimony and for new trial petitioner presented defenses of the three-year statute of limitations and that the government had not proved its case beyond a reasonable doubt. Each of these motions was overruled.

The Circuit Court of Appeals for the Fifth Circuit in a divided opinion, with Judge Sibley dissenting, affirmed the District Court holding that the statute of limitations of three years was not applicable and that the government had proved the petitioner guilty beyond a reasonable doubt. On both grounds Judge Sibley held that the conviction was unlawful.

2.

STATEMENT DISCLOSING THE BASIS UPON WHICH THIS COURT HAS JURISDICTION TO REVIEW THE JUDGMENT OF THE CIRCUIT COURT OF APPEALS

Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925 [28 U. S. C. A. Sec. 347 (a)] is the statutory authority for this Honorable Court to exercise its jurisdiction in this case by requiring that it be certified to this Court for determination and correction of the grievous errors committed below in the administration of the Federal Criminal Law.

On June 12, 1947 the Circuit Court of Appeals for the Fifth Circuit affirmed the judgment of the lower Court, and on August 2, 1947 overruled a petition for rehearing which had been filed on June 30, 1947 and this petition for writ of certiorari is presented within thirty days from such final judgment.

3.

QUESTIONS PRESENTED

It is apparent from the statement under 1, supra, that the questions presented are:

(1) Whether the three-year statute of limitations barred the prosecution and conviction for the crime charged in the indictment.

(2) Whether the Government proved beyond a reasonable doubt that the petitioner committed the crime charged in the indictment.

4.

REASONS RELIED ON FOR THE GRANTING OF THIS PETITION FOR WRIT OF CERTIORARI

(1) The majority opinion of the Circuit Court of Appeals in deciding that the three-year statute of limitations did not bar this prosecution and conviction has decided a highly important question of Federal Criminal Law which has not been but should be settled by this Court in order to make uniform the general rule that the statute of limitations begins to run from the date that the crime is complete in accordance with the following authorities of this Honorable Court:

United States v. Clark Irvine, 98 U. S. 450, 25 L. Ed. 193;

United States v. Kissell, 218 U. S. 601, 31 S. Ct. 124, 54 L. Ed. 1168.

(2) The majority opinion of the Circuit Court of Appeals in deciding that the three-year statute of limitations did not bar prosecution and conviction for the completed crime of failure to register on February 16, 1942 has decided an important question of Federal Criminal Law in a way probably in conflict with the applicable decisions of this Court as shown by the cases cited under (1) above, and the following cases on crimes charging conspiracy:

Brown v. Elliott, 225 U. S. 392, 32 S. Ct. 812;
Hyde v. United States, 225 U. S. 347, 32 S. Ct. 793;
Ledbetter v. United States, 170 U. S. 606, 18 S. Ct. 774, 42 L. Ed. 1162;
Pendergast v. United States, 317 U. S. 412, 63 S. Ct. 268.

(3) The majority opinion of the Circuit Court of Appeals in deciding that the completed crime of failure to register on February 16, 1942 was a continuing crime has so far departed from the accepted and usual course of judicial proceedings, and has so far sanctioned such a departure by the District Court, as to call for an exercise of this Court's power of supervision in light of the following authorities directly to the contrary:

United States v. Clark Irvine, 98 U. S. 450, 25 L. Ed. 193;
United States v. Kissell, 218 U. S. 601, 31 S. Ct. 124, 54 L. Ed. 1168;
United States v. Salberg, 287 Fed. 208;

Marcus v. United States, 20 Fed. (2d) 454, Third Circuit;

Brouse v. United States, 68 Fed. (2d) 294, First Circuit;

Warren v. United States, 199 Fed. 753, Fifth Circuit;

United States v. Trotter, 8 Fed. Sup. 275.

(4) When the petitioner failed to register on February 16, 1942 as charged in the indictment he completed an offense under the statute irrespective of any duty he had thereafter to register, compliance with which would not have cancelled the completed crime. The holding of the majority opinion of the Circuit Court of Appeals to the contrary robs the petitioner of his valuable protection of the statute of limitations.

(5) The majority opinion of the Circuit Court of Appeals in holding that petitioner was guilty beyond a reasonable doubt has so far departed from the accepted and usual course of judicial proceedings, and has so far sanctioned such a departure by the District Court, as to call for an exercise of this Court's supervision because the testimony of the witness Joseph Fogel, brother of petitioner, places the petitioner's birth date in 1893 which would make him more than forty-five years of age on February 16, 1942, and therefore not required to register on that date. Petitioner was not sure of his age and no other witness testified. The dissenting opinion of Judge Sibley shows clearly that there is reasonable doubt.

Petitioner files herewith certified transcript of the record including the proceedings in the Circuit Court of Appeals below.

WHEREFORE, petitioner respectfully prays that a writ of certiorari may issue out of and under the seal of this Court, directed to the United States Circuit Court of Appeals, Fifth Circuit, commanding that Court to certify and send to this Court on a day certain, to be therein designated, a full and complete transcript of the record and all proceedings in the cause entitled Samuel Hannah Fogel v. United States of America, No. 11930, on the docket of said Court, to the end that the case may be reviewed and determined by this Court as provided by law, that the judgment of the Circuit Court of Appeals may be reversed, and that your petitioner may have such other and further relief and remedy as this Court may deem appropriate and in conformity with law.

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Dallas, Texas,
Attorney for Petitioner.

HOWARD DAILEY,
EMIL CORENBLETH,
Of Counsel.

BRIEF IN SUPPORT OF PETITION

JURISDICTIONAL GROUNDS

The judgment of the Court of Civil Appeals for the Fifth Circuit in this cause was rendered June 12, 1947. (R. p. 86.) The majority opinion and the dissenting opinion have not yet been reported. Petition for rehearing was filed June 30, 1947 (R. pp. 87-89), and the order denying the rehearing was August 2, 1947. (R. p. 90.)

It is sought to bring this case before this Court on a petition for writ of certiorari as provided for by Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925. [28 U. S. C. A. Sec. 347 (a).] And, it is submitted that this is a case which this Court should supervise by granting a writ of certiorari because of the grave importance involved in the uniform and fair administration of the Federal Criminal Law.

STATEMENT OF THE CASE

This is a criminal case in which the petitioner was convicted of a felony under an indictment found by the Grand Jury on January 22, 1947, alleging his failure to register on February 16, 1942 in violation of the Selective Training & Service Act of 1940 as amended and rules, orders and regulations issued thereunder. (R. pp. 1-2.) Petitioner was sentenced by the Court which tried the case without the aid of a jury to eighteen months in the penitentiary and to pay a fine of One Thousand ($1,000.00) Dollars. (R. pp. 4-5.)

By proper motion to dismiss the indictment (R. pp. 2-3) and for acquittal at the closing of the government's case (R. p. 33), and at the close of all the testimony (R. p. 58) and for new trial (R. pp. 6-13) petitioner presented the defenses of three-year statute of limitations, and that the government had not proved its case beyond a reasonable doubt. Each of these motions was overruled. (R. pp. 4, 44, 62-64; and 13-14.)

The Circuit Court of Appeals for the Fifth Circuit in a divided opinion, with Judge Sibley dissenting (R. pp. 77-85) affirmed the District Court (R. p. 86) holding that the statute of limitations of three years was not applicable and that the government had proved the petitioner guilty beyond a reasonable doubt. On both grounds Judge Sibley held that the conviction was unlawful. (R. pp. 81-85.)

Petitioner respectfully submits that the three-year statute of limitations did bar his prosecution and conviction and that the government did not prove beyond a reasonable doubt that he was guilty as charged.

SPECIFICATIONS OF ERRORS RELIED UPON

1. The Courts below erred in refusing to hold that this prosecution was barred by the three-year statute of limitations since the indictment was not found within three years from the time that the offense is alleged to have been and was committed.

2. The Courts below erred in refusing to acquit the petitioner of the charges because it was not shown beyond a reasonable doubt that the petitioner was between the

ages of eighteen and forty-five years on or about February 16, 1942 when he was ordered to present himself for and submit to registration under the Selective Training and Service Act of 1940 as amended.

Argument under Specification of Error No. 1

The indictment which was filed January 22, 1947 charges:

> "that heretofore, to-wit, on or about the 16th day of February, A. D. 1942, one Samuel Hannah Fogel * * * in Dallas County, Texas, * * * did * * * fail and neglect to register with a Selective Service Draft Board * * * in violation of the Act of Congress, commonly cited as the Selective Training and Service Act of 1940, as amended, and the Rules, Orders and Regulations issued and promulgated by virtue of and in pursuance thereto." (R. pp. 1-2.)

The Selective Training and Service Act of 1940 as amended in Section 302 provides that:

> "It shall be the duty of every male citizen residing in the United States, who, on the day or days fixed for the first or any subsequent registration, is between the ages of eighteen and sixty-five, to present himself for and submit to registration at such time or times and place or places, and in such manner and in such age group or groups, as shall be determined by the rules and regulations prescribed hereunder." *(Title 50, U. S. C. A., Sec. 302.)*

Section 310 of the same title prescribes the offense and punishment for the failure of such person to present himself for and to submit to registration as provided in the statute.

Since the Selective Training and Service Act did not specifically provide for any limitation within which the government must proceed against one who it is alleged violated any of its provisions, the general limitation statutes are applicable. Title 18, Section 582, U. S. C. A. provides:

> "No person shall be prosecuted, tried or punished for any offense, * * * unless the indictment is found, or the information instituted within three years next after such offense shall have been committed."

Under the provisions of the Selective Training and Service Act, the President issued certain proclamations, rules and regulations, and among them was the proclamation requiring all male persons residing in the United States between the ages of eighteen and forty-five to present themselves for and submit to registration on February 16, 1942. A subsequent proclamation required all male citizens between the ages of eighteen and sixty-five to register on April 27, 1942. The petitioner failed to present himself for and submit to registration on either day. Accordingly, the respondent indicted petitioner for failure to present himself and submit to registration on February 16, 1942, and the indictment was found and filed on January 22, 1947 nearly five years after the alleged offense was committed.

When the petitioner did not register on February 16, 1942 he violated the law and the offense was complete. The crime after that day was complete. Therefore, the statute of limitations began to run from that date, and three years thereafter barred prosecution for that crime. This position is directly sustained by the case of *United States v. Salberg, 287 Fed. 208*, where the defendant was charged with

failing and refusing to register under the Selective Service Act of 1917, in an indictment charging the defendant with failure to register on June 5, 1917 as required by the President's proclamation, and the indictment was not found within the three-year period from June 5, 1917. There the Court held that the offense charged as well as the offense committed was barred by the statute of limitation. The Selective Service Act of 1917 insofar as the registration provision thereof is concerned, is not unlike that of 1940. Both require all male persons between certain ages to present themselves for and submit to registration under the provisions of the Act, and the Court in the *Salberg case* refused to hold that the offense of the failure to register upon the day certain as charged in the indictment was any continuing offense which would rob the defendant of the protection of the statute of limitation.

This position is also sustained in principle by this Honorable Court in the case of *United States v. Clark Irvine, 98 U. S. 450, 25 L. Ed. 193*, where the indictment charged the defendant with wrongfully withholding pension money and that he had continuously withheld it until the time of finding the indictment in September, 1875, which was more than two years from the time the defendant took possession of the money and withheld it from the one rightfully entitled to it. The defendant pled the two-year statute of limitations and this Honorable Court held the prosecution and conviction for the crime so charged was barred by the statute and was unlawful, in face of the argument by the government that the defendant continued to withhold the money every year, every month, and every day within the

meaning of the statute. This Honorable Court held that there is but one offense and that it is committed when the act or series of acts necessary to constitute a criminal withholding of the money have transpired, and that then the crime is complete and from that day the statute of limitations begins to run against the prosecution, and stated:

> "We do not so construe the act. Whenever the act or series of acts necessary to constitute a criminal withholding of the money have transpired the crime is complete and from that day the statute of limitations begins to run against the prosecution."

This position is likewise sustained in principle by this Honorable Court in the case of *United States v. Kissell, 218 U. S. 601, 31 S. Ct. 124*, wherein this Honorable Court states that "the mere continuance of the result of a crime does not continue the crime," as well as other cases of this Honorable Court dealing with charges of conspiracy, to-wit:

Brown v. Elliott, 225 U. S. 392, 32 S. Ct. 812;
Hyde v. United States, 225 U. S. 347, 32 S. Ct. 793;
Ledbetter v. United States, 170 U. S. 606, 18 S. Ct. 774, 32 L. Ed. 1162;
Pendergast v. United States, 317 U. S. 412, 63 S. Ct. 268.

This position is also sustained in principle by the following cases decided by the United States Circuit Court of Appeals:

In *Warren v. United States, 199 Fed. 753 (Fifth Circuit)*, defendant was indicted and convicted in the lower Court for concealing assets from a trustee in bankruptcy

under an indictment found more than twelve months after the election of the trustee. The indictment charges that the defendant on or about a certain day and continuously thereafter concealed from the trustee property belonging to the bankrupt estate. Nevertheless, the Circuit Court of Appeals for the Fifth Circuit reversed this conviction on the ground that the crime was completed when the trustee was elected and the property of the bankrupt estate was withheld from him and that the statute of limitations began to run from that date. Said Court cited and quoted from the case of *United States v. Clark Irvine, supra*, and refused to hold that there was any continuous offense although the concealment continued. This was merely the result of the crime already committed. In the case at bar the majority opinion refused to recognize that Court's own decision in this *Warren case.*

In *Marcus v. United States, 20 Fed. (2d) 454, (Third Circuit)*, where the defendant was indicted and prosecuted for concealing assets from the trustee in bankruptcy and the Court held that the offense was complete when the trustee was elected. The statute of limitations began to run from that date.

This position is also upheld in the District Court case of *United States v. Trotter, 8 Fed. Supp. 275* which is also upon concealment of assets from a trustee in bankruptcy wherein the indictment also alleges continuous withholding and concealing. Nevertheless, the Court held that the crime was complete from the date that the trustee was elected and that the statute of limitations began to run from

that date. Upon that date an indictment or information could have been filed.

Judge Sibley in his dissenting opinion shows clearly the fallacy of the majority opinion. He also sustains the position that the crime was complete when the petitioner failed to register on the date set for the registration. And, the petitioner could have been promptly indicted even though he may have been under a continuing duty to register, and even though he may have subsequently registered. Such subsequent registration would not have cancelled his prior crime. He did not have to do anything else after his failure to register and unless the statute of limitations bars the prosecution and conviction for this failure to register, petitioner is denied the benefit and the protection of such statute and such substantive right. *U. S. ex rel. Hassell v. Mathues, 27 Fed. (2d) 137.*

That there was a continuing duty to register need not be challenged. No doubt this continuing duty was set out in the regulations in order to reach those citizens or residents who were confined in the penitentiary, or who were sick, or who were beyond the confines of the United States on the date set for the registration; but the existence of such continuing duty could not make this a continuing offense and crime when the petitioner did nothing at all after he failed to register and his offense and crime became complete then. In this light, the cases upon conspiracy where overt acts were committed in pursuance to the original agreement or where other acts were committed to carry the original agreement forward are inapplicable. So, those cases where defendants are charged with failure to keep their local

draft boards informed of their whereabouts under indictments which alleged a period of time that was not barred by the statutes of limitations [*U. S. v. Guertler, 147 Fed. (2d) 796*], are inapplicable; and the same can be stated with reference to keeping records under the maximum price regulations where the indictment charges the failure of the defendant to keep the records between certain periods, which periods were within the statutory time. *(U. S. v. Belfast Fabrics Corporation, 65 Fed. Supp. 567.)*

Mere concealment of a crime without doing anything more to complete it, and where the defendant has done nothing else after he has completed it, cannot continue the crime and prevent the defendant from taking advantage of his substantive right of the protection of the statute of limitation. (Cases cited above, as well as the *T. F. Hart Inv. Co. v. Great Eastern Oil Co., 27 Fed. Supp. 713.)*

The majority opinion of the Court below did not cite a single case to sustain it on this question. Judge Sibley's dissenting opinion cites some of the cases set out above and reasons the matter correctly. All the authority is against the respondent's position.

The President issued a subsequent proclamation requiring all citizens and residents between the ages of eighteen and sixty-five years to register on April 27, 1942. Assuming that the respondent is not bound by the dates set out in the indictment, nevertheless, the failure of the petitioner to register on April 27, 1942 is still nearly five years before the indictment was found. However, the date charged

in the indictment will be accepted upon the question of limitations unless evidence is introduced to vary it. [*Brouse v. United States, 68 Fed. (2d) 294, First Circuit; Allred v. United States, 146 Fed. (2d) 193, Ninth Circuit.*] In the case at bar the evidence is conclusive that the petitioner failed to register on February 16, 1942 which is the date charged and there is no proof that the crime was committed and completed within the statutory period of limitations. *(Ledbetter v. United States, 170 U. S. 606, 18 S. Ct. 774; 42 L. Ed. 1162.)*

Most of the testimony in the record is in regard to the petitioner's age. The only evidence which the Government introduced was an admission by the petitioner long after February 16, 1942 in a hearing before the Immigration authorities that he thought he was born on July 10, 1898. Assuming that this is his birth date, he would have been forty-five years old on July 10, 1943. Adopting the Government's argument that the petitioner was under a continuing duty hourly, daily, weekly, monthly, yearly, to present himself for and submit to registration after February 16, 1942, he was certainly under no such continuing duty under the proclamation of the President upon which the indictment in this case is predicated after he became forty-five years old. On July 10, 1943 he was forty-five years old and it is clearly evident that the indictment was found in this case more than three years after that date. Even under this far-fetched and unreasonable theory of the respondent the conviction is unlawful.

Argument under Specification of Error No. 2

The indictment charges that

> "the said defendant was then and there such a person who was bounden under the provisions of said Act, Rules, Orders and Regulations to so register as is required by the provisions of the said Act and the said Rules, Orders, and Regulations." (R. p. 2.)

In view of such allegations, which were necessary, respondent had the burden to establish beyond a reasonable doubt that petitioner was between the ages of eighteen and forty-five on February 16, 1942 which was the date set for registration of such ages.

Therefore, most of the testimony in the record was with respect to the age of the petitioner on that date. This testimony with respect to the petitioner's age as introduced by the respondent consisted solely of admissions made by petitioner on February 7, 1946 and September 12, 1946 before Mr. Glenn A. Torrence, an examiner of the United States Immigration and Naturalization Service, that he was born on July 10, 1898. (R. pp. 19-21.) These admissions were in connection with naturalization proceedings but were made long after the alleged offense. Also the Government introduced testimony of Mr. Alton Bryant, Special Agent of the F. B. I. who testified that petitioner stated he did not know exactly when he was born, but thought he was born some time between 1895 and 1898. (R. p. 29.) This took place in October, 1946 long after the alleged offense. (R. p. 27.)

The above constitutes all the evidence introduced by the Government with respect to the age of the petitioner, and the only other evidence in the record is that of Joseph Fogel, the brother of the petitioner, who testified as follows: That he has lived in Philadelphia, Pennsylvania for thirty-four years, married and has three boys, and became a naturalized citizen in 1919 (R. pp. 44-45); that he came to this country when he was twenty-one years old in 1912 from Poland which was under Russian control; that there were seven children in his family; that all of them were killed or died and only he and the petitioner are living (R. p. 46); that he sent for the petitioner to come to the United States shortly after he arrived here and sent the petitioner the tickets for his transportation, and the petitioner was close to twenty when he arrived here on June 18, 1913 (R. p. 47); that petitioner stayed and lived with the witness until 1915 or 1916 when he moved to Texas (R. p. 48); that witness was about two and a half years older than the petitioner, and that one of their brothers or sisters who was born in between them had died (R. p. 50); that he knows the name of the ship on which the petitioner arrived in the United States and had an independent recollection of petitioner's age (R. p. 51); that he left Poland before he was twenty-one years of age so as to escape the Russian Army (R. p. 52); that he was in the clothing business and registered for the selective service in this last war (R. pp. 53-54); that he had two boys who were in the last war, one of whom was shot down after twenty-five missions over Germany. (R. p. 57.)

Accepting the testimony of Joseph Fogel who was not impeached and whose testimony was the only direct testimony upon the question of the age of the petitioner, respondent has certainly failed to prove beyond a reasonable doubt that the petitioner was between the ages of eighteen and forty-five on February 16, 1942 and therefore that he committed the crime charged. The only authority needed for this assertion is the dissenting opinion of Judge Sibley. (R. pp. 81-85.) The existence of this reasonable doubt also makes this conviction unlawful.

CONCLUSION

Petitioner respectfully prays that the accompanying petition for writ of certiorari be granted, and that the errors in the judgment of the Circuit Court of Appeals be corrected.

This cause is earnestly and confidently submitted.

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